Supreme Court, U.S.
FILED
SEP 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-201

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JEFFREY LOVINGER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BEST AVAILABLE COPY

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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Printed by Authority of the State of Illinois (P.O. 32988—50—9-26-85)

QUESTION PRESENTED FOR REVIEW

Whether petitioner has failed to present a substantial federal question for review where, consistent with precedent of this Court and that of other jurisdictions, the lower court found him to have consented to the declaration of a mistrial based upon the unique facts of this case?

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully in the argument contained herein, respondent does not believe that petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

STATEMENT OF THE CASE

Respondent accepts petitioner's Statement of the Case for purposes of this Brief in Opposition. Additional facts necessary for an understanding of the issues raised by the petition will be included in the argument portion of this brief with appropriate record references.

REASONS FOR DENIAL OF THE WRIT

PETITIONER HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW WHERE, CONSISTENT WITH PRECEDENT OF THIS COURT AND THAT OF OTHER JURISDICTIONS, THE LOWER COURT FOUND HIM TO HAVE CONSENTED TO THE DECLARATION OF A MISTRIAL BASED UPON THE UNIQUE FACTS OF THIS CASE.

Petitioner unfairly characterizes the lower court's decision here to rest upon but two circumstances: that petitioner did not interpose a contemporaneous objection to the trial court's declaration of a mistrial and that petitioner had previously moved for a mistrial due to an incident separate from those identified by the judge as the cause for his ruling. Rather, the appellate court based its finding of implied consent on the totality of the circumstances presented by the record. These circumstances include the facts that (1) petitioner's case was prosecuted as a bench trial; (2) petitioner's motion for a mistrial was predicated upon his belief, despite denial by the prosecution, that State's witness Hutchings was being coached during a recess concerning the chain of custody of various

exhibits (R. 453, 456, 457); (3) the trial judge repeatedly stated for the record that he deemed out-of-court conversations between the prosecutor and his witnesses improper and possible grounds for a mistrial (R. 454-56, 486, 550, 620); (4) the defense motion for a mistrial was denied because Hutchings' conversation with the prosecutor was not found to be prejudicial (R. 454, 456); (5) the testimony of Bowden, which followed that of Hutchings, was interrupted by a recess after which the defense complained of a second prejudicial out-of-court conversation between the prosecutor and his witness concerning the chain of custody of the State's exhibits (R. 622); (6) after hearing conflicting accounts of the conversation between the prosecutor and Bowden (R. 622-27), the judge noted his belief that "a lot of" error was beginning to creep into the record and called a recess to review police reports and the court reporter's notes of what had transpired (R. 629); (7) when the judge resumed the bench, he indicated that he was declaring a mistrial in part because the prosecutor and a witness had discussed a pending matter out of court despite the judge's admonitions and gave inconsistent accounts of the conversation (R. 630-32); and (8) petitioner did not raise an objection to the mistrial until over a month later after the case had been reassigned to a new judge. (C. 121-24) In light of these additional facts, the appellate court's holding is not at odds with any precedent of this Court (*see* Petition at 30) and is consistent with developing caselaw from other jurisdictions. Accordingly, petitioner has failed to present a substantial federal question for review by this Court.

In support of his proposition that failure to object to the court's declaration of a mistrial should not reflect a defendant's consent to the mistrial, petitioner cites *United States v. Dinitz*, 424 U.S. 600 (1976), *United States v.*

Jorn, 400 U.S. 470 (1971), *Curry v. Superior Court*, 470 P.2d 345 (Cal. 1970), and *Torres v. State*, 614 S.W.2d 436 (Tex. Crim. 1981). In *Dinitz*, this Court made it clear that a defendant may be held to have consented to a mistrial even though he has not personally made a knowing and voluntary waiver of the right not to be placed twice in jeopardy and even though he has been presented with a "Hobson's choice" as a result of unintentional judicial or prosecutorial error. 424 U.S. at 608, 609, n. 11. While petitioner correctly notes that *Dinitz* found critical to the issue of consent whether a defendant has retained "primary control over the course to be followed in the event of such error" (*id.* at 609), nothing in that case suggests that control over the proceedings is lost merely because the court *sua sponte* orders a mistrial, which order could be easily rescinded upon request by the defense. Similarly, this Court in *Jorn* required a showing of manifest necessity only where the trial court's actions have actually *deprived* or *foreclosed* a defendant of his option to complete his trial before a particular tribunal. 400 U.S. at 484, 485. Indeed, it was specifically pointed out in *Jorn* that the defendant there had been given no opportunity to object to the discharge of his jury and recommend viable alternatives to a mistrial. *Id.* at 487.

Unlike *Jorn*, where the trial court's discharge of the jury irrevocably foreclosed the defendant from the benefit of its verdict, petitioner in the present case had ample opportunity to voice any objection to the mistrial before the objection would have been futile. First, contrary to petitioner's assertion, the mistrial cannot be deemed to have been announced "suddenly"; it was declared only after the court made clear its view that any out-of-court conversations between the prosecutor and his witnesses would be grounds for a mistrial if found prejudicial, after

petitioner had moved for a mistrial alleging off-the-record coaching of his witness by the prosecutor concerning the chain of custody, after petitioner complained that during a recess the prosecutor coached another witness concerning the same subject matter, after a hearing was held on the substance of that conversation wherein conflicting testimony was given which clearly disturbed the judge, soon after the court recessed proceedings to review what had transpired, and immediately after the judge registered on the record his dissatisfaction with the accounts of their conversation given by the prosecutor and Bowden. Second, even assuming the court's ruling could not have been anticipated by the defense and was made as the judge left the bench, it was certainly not a *fait accompli*; the trial court had in no way been put on notice that petitioner might not be in agreement with its ruling and the defense could have easily moved for reconsideration of the order that day or the next. If successful, his conditional right to have Judge Hoogasian sit as trier of fact would have remained intact.

It is true that in *Curry*, the court suggested that mere silence in the face of a mistrial order can never constitute implied consent. *But see United States v. Phillips*, 431 F.2d 949 (3rd Cir. 1970). Even if this proposition were accepted, however, the jurisdictions appear to be in agreement that a defendant's failure to affirmatively express actual or potential disagreement with the court's declaration of a mistrial at a time when it could be effectively rescinded is a highly relevant factor in resolving the issue. *See, e.g., United States v. Smith*, 621 F.2d 350 (9th Cir. 1980) (implied consent found where prior to discharge of jury, defense counsel did not object to *sua sponte* mistrial order and indicated his understanding that retrial would occur); *People v. Lawton*, 487 N.Y.S.2d 278 (Sup.

1985) (same); *Anderson v. United States*, 481 A.2d 1299 (D.C. App. 1984) (implied consent found where defense had argued prejudice from improperly admitted testimony and failed to object to the *sua sponte* declaration of a mistrial based upon the error); *Sedgewick v. Superior Court for the District of Columbia*, 584 F.2d 1044 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979) (where defendant had moved for dismissal due to *Brady* violation, but the court declared mistrial instead, defendant had duty to make his position on the issue clear); *People v. Montlake*, 184 A.D. 578, 172 N.Y.S. 102 (1918) (where defense motion for mistrial based upon improper prosecutorial comments denied but mistrial later ordered without objection due to subsequent but similar error, implied consent); *State v. Wolak*, 33 N.J. 399, 165 A.2d 174 (1960), *cert. denied*, 365 U.S. 822 (1961) (implied consent where denial of defense motion for mistrial reconsidered three days later without objection); *United States v. Goldstein*, 479 F.2d 1061 (2nd Cir. 1973) (where defendant moved for a mistrial on grounds of jury deadlock and mistrial declared by court after two hours of further jury deliberation, defense had duty to make change in position known to the court); *People v. Bowman*, 194 N.W.2d 36 (Mich. 1970) (defendant obliged to object when trial court reconsidered denial of his motion for mistrial); *Kamen v. Gray*, 220 P.2d 160 (Kan. 1950), *cert. denied*, 340 U.S. 890 (1950) (same); *United States v. Gordy*, 526 F.2d 631 (5th Cir. 1976) (*dicta* that defendant's failure to timely object to the *sua sponte* declaration of a mistrial may vitiate his double jeopardy claim). *Compare Torres v. State*, *supra* (no implied consent found where co-counsel objected to mistrial and counsel not given opportunity to consult with defendant despite request).

Petitioner correctly notes that in some of the above cases, the defendant had both moved for a mistrial and the mistrial was ultimately ordered on the same grounds pressed in support of the motion. He errs, however, in suggesting these cases to be thereby distinguishable on facts significant to the double jeopardy prohibition. When a defendant moves for a mistrial, he formalizes his position, though perhaps temporary, that irremediable error has been injected into the trial and that proceedings before the initial trier of fact should be aborted. Regardless of the error giving rise to a later *sua sponte* declaration of mistrial, the ultimate issue facing a defendant remains the same: does he still believe that a mistrial will enure to his benefit or have intervening events altered that evaluation? And while it is true that a later *sua sponte* declaration of a mistrial on grounds unrelated to those pressed by a defendant in his motion might be subject to abuse were the defendant held to have irrevocably waived his right to proceed with the trial, no potential for abuse is present when a defendant is given the opportunity to make his contrary position known to the court.

Finally, for the same reasons that the mistrial ruling in the present case cannot be considered to have been suddenly announced, the basis for petitioner's motion for a mistrial cannot be fairly characterized as unrelated to the court's decision to terminate the trial. Particularly under these circumstances, it does no violence to the double jeopardy clause to require a defendant to notify the court that he no longer considers a mistrial to be in his best interests.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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